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No. 89-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PAUL C. MAGGIO, d/b/a PATCHOGUE NURSING CENTER,

Petitioner,

—v.—

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, R.W.D.S.U., AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

The decision of which petitioner seeks review is an unpublished summary order of the United States Court of Appeals for the Second Circuit affirming a district court order which confirmed a labor arbitration award concerning the discharge of an employee. App. 1.[1]

The employee was employed as an orderly at the nursing home operated by petitioner. Petitioner discharged the

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1 Page references preceded by "App." are to the appendix annexed to the petition.

employee for allegedly having abused four patients. Respondent, the collective bargaining representative of petitioner's employees, filed a grievance on behalf of the employee and took the matter to arbitration. App. 7-8, 24-25.

After four days of hearing, the arbitrator found that two of the alleged acts of patient abuse had not occurred, and that the other two involved unintentional conduct caused by the employee's "size, bulk, strength and, at times, being rushed to perform chores". App. 9, 31-37. The arbitrator ruled that petitioner had failed to establish cause for discharge and converted the disciplinary penalty to a one-month suspension. App. 9, 37.

Meanwhile, petitioner filed a report concerning the alleged patient abuse with the New York State Office of Health Systems Management ("OHSM"), as it was required to do if it had reasonable cause to believe any patient abuse or mistreatment had occurred. *See* N.Y. Pub. Health L. § 2803-d(1). Such a report automatically triggers an investigation by OHSM. N.Y. Pub. Health L. § 2803-d(6)(a). After the investigation, OHSM made an initial determination that there was sufficient credible evidence to sustain the allegations that the employee had engaged in patient abuse, and recommended that no fine be assessed, but that the letter containing the initial determination serve as an "admonishment". App. 40-41. That letter alone constitutes the "findings" of the Department of Health upon which petitioner relies.

Petitioner refused to comply with the arbitrator's award and moved in the district court to vacate the award. Local 1199 commenced an action for confirmation of the award. On cross-motions for summary judgment, the district court confirmed the award in all respects. *Maggio v. Local 1199*, 702 F. Supp. 989 (E.D.N.Y. 1989) (reprinted at App. 5-23), *aff'd mem.*, No. 89-7142 (2d Cir. June 13, 1989) (reprinted at App. 1-4). In rejecting petitioner's contention that enforcement of the arbitrator's award would violate public policy, the court observed that any analysis of the issue had to take place within the context of the longstanding federal policy favoring labor arbitration. App. 10. It then reviewed in detail both the federal and

state regulatory schemes upon which petitioner based its public policy argument and concluded that "a fair reading of the Award reveals that [the employee] did not engage in the type of conduct that the aforementioned statutory scheme seeks to prevent," and that "the arbitrator's opinion is completely in line with the policy identified by [petitioner]." App. 21.

In an unpublished summary order, the court of appeals unanimously affirmed the district court judgment, and adopted the reasoning of the district court in finding "no violation of public policy by the arbitrator's award". App. 3.

REASONS WHY THE PETITION SHOULD BE DENIED

There is no reason to grant the petition. Petitioner has not identified any respect in which the court of appeals' order conflicts with that of another court of appeals or state court of last resort, or "so far depart[s] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a). It advances two purported reasons for granting the petition: (1) an issue that the Court did not reach in *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987) and (2) a supposed conflict with the Court's holding in *Misco*. Both arguments are completely meritless.

POINT I

CONTRARY TO PETITIONER'S CONTENTION, THIS CASE DOES NOT PRESENT AN ISSUE LEFT OPEN BY THE COURT IN *MISCO*.

Petitioner contends that "this case presents an important issue not reached in [*Misco*] . . . : '[W]hether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer.' " Petition at 5 (quoting *Misco*, 108 S. Ct. at 375 (Blackmun, J., concurring)). However, petitioner

fails to explain, beyond this bald assertion, just how the issue is presented in the instant case. Examination of the decisions below reveals that, in fact, the issue is not presented at all.

Neither the district court nor the court of appeals even mentioned this issue, much less addressed it in their decisions. A case in which an issue has never been addressed would make an exceedingly poor vehicle for presentation of the issue to this Court. Furthermore, the detailed findings of the district court, which were adopted by the court of appeals, establish that there was no conflict at all between the award and the relevant public policies, App. 20-21, thus eliminating any need to address the issue of how sharp a conflict with public policy is necessary to warrant setting aside an award. This case simply does not present the issue identified by Justice Blackmun in his *Misco* concurrence.

POINT II

NO ISSUE CONCERNING THE APPLICATION OF *MISCO* BY THE COURTS BELOW MERITS REVIEW.

Petitioner also contends that "this case presents the issue whether, under *Misco*, a court may refuse to enforce an arbitrator's award that violates an 'explicit . . . well defined and dominant' policy on the ground that such public policy is not 'explicit . . . well defined and dominant' *enough*." Petition at 5-6 (emphasis and unattributed quotations in original). Again, petitioner is incorrect. Neither the district court nor the court of appeals ruled that the arbitrator's award violated an explicit, well-defined and dominant public policy, nor, for that matter, any other sort of public policy. Quite to the contrary, the district court found, and the court of appeals agreed, that "the arbitrator's opinion is completely in line with the policy identified by Maggio." App. 21, 3.

Petitioner makes much of the court of appeals' use of the word "enough" in describing the kind of public policy which was lacking in this case. Petitioner argues that by using the word "enough", the court of appeals "lowered the *Misco* stan-

dard". Petition at 7. It is clear from the court of appeals' order, however, that the court did nothing more than properly apply *Misco* to the findings of the district court. But even if petitioner were correct, and the court had in fact "lowered the *Misco* standard", the issue nonetheless would not merit review. First, the holding as to whether the public policy at issue was explicit, well-defined and dominant, was not necessary to the result in light of the holding of the district court, adopted by the court of appeals, that the award was wholly consistent with the public policy. That is, the disputed holding was dictum, and inappropriate for review by this Court. Second, the offending word appears only in an unpublished summary order, citation of which in an unrelated case is forbidden by court rule. *See* Second Cir. R. § 0.23. Thus, even if the standard recited by the court of appeals were incorrect, no other case would be affected by the error.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

Section 2803-d(1) of the New York Public Health Law provides:

> 1. The following persons are required to report in accordance with this section when they have reasonable cause to believe that a person receiving care or services in a residential health care facility has been physically abused, mistreated or neglected by other than a person receiving care or services in the facility: any operator or employee of such facility, any person who, or employee of any corporation, partnership, organization or other entity which, is under contract to provide patient care services in such facility, and any nursing home administrator, physician, medical examiner, coroner, physician's associate, specialist's assistant, osteopath, chiropractor, physical therapist, occupational therapist, registered professional nurse, licensed practical nurse, dentist, podiatrist, optometrist, pharmacist, psychologist, certified social worker, speech pathologist and audiologist.

Section 2803-d(6) of the New York Public Health Law provides:

> 6. (a) Upon receipt of a report made pursuant to this section, the commissioner shall cause an investigation to be made of the allegations contained in the report. Notification of the receipt of a report shall be made immediately by the department to the appropriate district attorney if a prior request in writing has been made to the department by the district attorney. Prior to the completion of the investigation by the department, every reasonable effort shall be made to notify, personally or by certified mail, any person under investigation for having committed an act of physical abuse, mistreatment or neglect. The commissioner shall make a written determination, based on the findings of the investigation, of whether or not sufficient credible evidence exists to sustain the allegations contained in the report or would support a conclusion that a person not named in such report has committed an act of physical abuse, neglect or mistreatment. A copy of such written

determination, together with a notice of the right to a hearing as provided in this subdivision, shall be sent by registered or certified mail to each person who the commissioner has determined has committed an act of physical abuse, neglect or mistreatment. A letter shall be sent to any other person alleged in such report to have committed such an act stating that a determination has been made that there is not sufficient evidence to sustain the allegations relating to such person. A copy of each such determination and letter shall be sent to the facility in which the alleged incident occurred.

(b) The commissioner may make a written determination, based on the findings of the investigation, that sufficient credible evidence exists to support a conclusion that a person required by this section to report suspected physical abuse, mistreatment or neglect had reasonable cause to believe that such an incident occurred and failed to report such incident. A copy of such written determination, together with a notice of the right to a hearing as provided in this subdivision, shall be sent by registered or certified mail to each person who the commissioner has determined has failed to report as required by this section.

(c) All information relating to any allegation which the commissioner has determined would not be sustained shall be expunged one hundred twenty days following notification of such determination to the person who made the report pursuant to this section, unless a proceeding pertaining to such allegation is pending pursuant to article seventy-eight of the civil practice law and rules. Whenever information is expunged, the commissioner shall notify any official notified pursuant to paragraph (a) of this subdivision that the information has been expunged.

(d) At any time within thirty days of the receipt of a copy of a determination made pursuant to this section, a person named in such determination as having committed an act of physical abuse, neglect or mistreatment, or as having failed to report such an incident; may request in

writing that the commissioner amend or expunge the record of such report, to the extent such report applies to such person, or such written determination. If the commissioner does not comply with such request within thirty days, such person shall have the right to a fair hearing to determine whether the record of the report or the written determination should be amended or expunged on the grounds that the record is inaccurate or the determination is not supported by the evidence. The burden of proof in such hearing shall be on the department. Whenever information is expunged, the commissioner shall notify any official notified pursuant to paragraph (c) of this subdivision that the information has been expunged.

(e) Except as hereinafter provided, any report, record of the investigation of such report and all other information related to such report shall be confidential and shall be exempt from disclosure under article six of the public officers law.

(f) Information relating to a report made pursuant to this section shall be disclosed under any of the following conditions:

(i) pursuant to article six of the public officers law after expungement or amendment, if any, is made in accordance with a hearing conducted pursuant to this section, or at least forty-five days after a written determination is made by the commissioner concerning such report, whichever is later; provided, however, that the identity of the person who made the report, the victim, or any other person named, except a person who the commissioner has determined committed an act of physical abuse, neglect or mistreatment, shall not be disclosed unless such person authorizes such disclosure;

(ii) as may be required by the penal law or any lawful order or warrant issued pursuant to the criminal procedure law; or

(iii) to a person who has requested a hearing pursuant to this section, information relating to the determination upon which the hearing is to be conducted; provided, however, that the identity of the person who made the report or any other person who provided information in an investigation of the report shall not be disclosed unless such person authorizes such disclosure.

(g) Where appropriate, the commissioner shall report instances of physical abuse, mistreatment or neglect or the failure to report as required by this section, to the appropriate committee on professional conduct for the professions enumerated in subdivision one of this section when a determination has been made after the commissioner has provided an opportunity to be heard.